1 International human rights law and notions of human rights: foundations, achievements and challenges

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1.1 INTRODUCTION

The term human rights is frequently used as if it were self-explanatory. It is tempting and not uncommon to view 'human rights' as something intrinsically good. Human rights are often labelled (somewhat mockingly) as the new religion, a label which illustrates the elevated status they appear to enjoy. On closer inspection, it becomes evident that the term human rights is used freely and sometimes loosely by members of different disciplines and the public at large, meaning different things – both positive and negative – to different people, depending on the context and the purpose for which it is used. It is therefore important to clarify the meaning(s) of the term by tracing its genealogy and examining its use in various contexts.

This undertaking cannot be confined to charting the development of international human rights law. Equating human rights with rights recognised in international treaties and/or other legal sources may in practice suffice when addressing particular human rights issues. Beyond this, it amounts to taking a purely positivist position that provides little guidance in response to a crucial question. Can a claim that something be recognised as a human right, for

example the right to same-sex marriage, be justified, even if it is currently not explicitly recognised in law?

Human rights have an important dual function: they are claims based on particular values or principles and often also legal rights that entail entitlements and freedoms. Philosophical and political conceptions of human rights are broader than international human rights law, which is essentially a normative term referring to rights validated in recognised sources. While the two spheres are closely intertwined, they do not necessarily share a causal or automatic relationship, i.e. that every claim must transform into a legally recognised right. Nor is the relationship always harmonious. A legally recognised right may be defined too narrowly and may therefore exclude certain categories: for example age may not explicitly fall within the purview of the right to non-discrimination, or conversely a recognised right may be wider than thin theories of human rights based on a limited number of core rights.

To take the meaning of human rights for granted, or simply to refer to formulas denoting rights that we have by virtue of being human, would ignore the controversy surrounding their foundations and validity. Theories of human rights abound, including substantive (based on moral values or foundational postulates), formal (constructive, pragmatic, discourse), subaltern (human rights as distinctive practices born out of struggle) and post-modern (empathy for the other) approaches, as well as political theories, such as liberal or socialist notions of human rights. It is in particular the purported universality of human rights, i.e. their applicability to everyone, everywhere and anytime, that has given rise to enduring debates. Those often, somewhat misleadingly, labelled 'cultural relativists' have raised important challenges regarding the supposed origins, validity, scope of application and politics of human rights. The question of political use and/or abuse of the language of human rights reaches beyond the universality debate but is an integral part of what can be seen as an increased probing of the 'innocence' of human rights. These overlapping debates may be seen as bewildering if not downright counterproductive, potentially undermining support for human rights at a time when much needs to be done to ensure their effective protection. However, downplaying or dismissing the importance of these debates may lead to a failure to answer satisfactorily the question of what we mean when we refer to human rights, which is critical in situations where the very idea is being challenged. It is perhaps inevitable that the notion of human rights is and will remain charged and will be used for differing if not contradictory ends. This does not mean that the notion is entirely open-ended, but it counsels against using it lightly without having considered its multiple dimensions. For human rights advocates, developing an understanding that is critically aware of these aspects is arguably the best way towards being convincing in the recurring public debates about human rights.

1.2 THE DEVELOPMENT OF HUMAN RIGHTS AND INTERNATIONAL HUMAN RIGHTS LAW

The founding document of international human rights law, i.e. the Universal Declaration of Human Rights (UDHR), refers in its preamble and article 1 to claims and freedoms that human beings enjoy by virtue of their humanity: that is, inherent rights. These rights are based on the principles of dignity, equality and liberty, and are underpinned by notions of solidarity. While the notion of human rights is arguably of more recent origin, it is part of a broader development that can be traced back to the earlier stages of human history.

At the core of human rights lie fundamental questions about the nature of human beings and their relationship with each other as members of societies, including 'international society'. In this context human rights address the relationship of individuals to others, in particular to those in a position of power (especially civil and political rights, equality and non-discrimination) and the relationships of groups and their members to others (minority rights, right to self-determination and rights of indigenous peoples); the settlement of disputes and administration of justice (fair trial in modern parlance); rights to participate in the polis (particularly freedom of expression and related rights, including the right to vote); and the material (in the broadest sense) conditions for a life of dignity and freedom (social, economic and cultural rights; the right to development).

This section traces the historical development of human rights and its most prominent manifestation, international human rights law. It examines the antecedents and formation of human rights with a view both to locating them in a broader socio-political history and to identifying their specific nature. This undertaking is important at a time when the validity of human rights, though seemingly triumphant, is being called into question on account of their association with particular historical and political developments and ideas that are associated with Western secular liberal democracies. Reflecting on shared concerns throughout history and identifying strands of thought and practices that have contributed to their development can, in this context, open up perspectives that provide human rights with broad-based legitimacy.

1.2.1 Foundations

International human rights law is a rather late addition to the body of international law whose modern origins are commonly located in the seventeenth and eighteenth centuries.[1] International law governed the relationship

[1] See for a thorough account, W. G. Grewe, *The Epochs of International Law* (Walter de Gruyter, 2000), and for a concise summary, S. C. Neiff, 'A Short History of International Law', in M. D. Evans (ed.), *International Law*, 4th edn (Oxford University Press, 2014), 3–28.

between states, which were recognised as its sole subjects. States were considered sovereign, which meant that the treatment of citizens and other individuals on their territories fell within their exclusive prerogative. While certain human rights concerns, such as religious persecution, were at times raised, individual or collective rights as understood today did not form part of the corpus of international law. This explains why international human rights law, when emerging with considerable force following World War II, drew heavily on ethical imperatives, concepts of rights and historical sources, as well as national declarations and constitutions. This was evident in the preparatory work to the UDHR, which was informed by the views of a number of philosophers and intellectuals about the nature and content of human rights and borrowed substantially from national rights declarations.[2]

Ancient and traditional cultures and societies, and the world's major religions, share a deep concern about human nature, ethics and justice. The major religions were faced with the task of constructing an ethical framework for the conduct of their members. This often took the form of commandments and the definition of desirable if not obligatory conduct, adherence to which would bring the rewards promised by each religion. This ranged from the principle of *ahimsa*, non-violence, shared by Hindus, Jains and Buddhists, to the ten commandments of the Old Testament, including 'thou shalt not kill', and the vision of a just society based on respect for the sanctity of life in Islam, complemented by exhortations to limit wealth and distribute material goods fairly.[3] Indian rulers such as Kautilya (350–283 BC) extolled the virtue of the rule of law in the treatise *Arthashastra*, or, as in the case of Asoka (304–232 BC), declared religious tolerance.[4] African societies also developed intricate principles and rules that governed the rights and duties of their members.[5] While notions of individual autonomy and rights were known in some societies, the question of how human beings treat each other and how best to exercise power in a polis was frequently framed as a matter of virtuous conduct and justice in conformity with reason, religious or customary commands. The principal concern was therefore the creation of a harmonious and just society rather than the protection of the rights of individuals. Nevertheless, it is clear that the principles, commandments and

[2] See below at 1.2.6.

[3] See for a good account of 'early ethical contributions to human rights', M. R. Ishay, *The History of Human Rights: From Ancient Times to the Globalization Era* (University of California Press, 2008), 16–61.

[4] Ibid., 29–30.

[5] See M. Mutua, *Human Rights: A Political and Cultural Critique* (University of Pennsylvania Press, 2002), 71–93, and the work of F. M. Deng on the Dinka, a good overview of which, together with further references, can be found in W. Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge University Press, 2009), 378–93.

practices sketched out above have contributed to the development of modern human rights law.[6]

1.2.2 The American and French declarations of rights

The United States (US) Declaration of Independence (1776) (and later the Bill of Rights (1791)) and the French Declaration of the Rights of Man and of the Citizen (1789) were the outcome of political struggles that drew on natural law and liberal theories of rights.[7] The American Declaration emphasised the right to life, liberty and the pursuit of happiness while the French Declaration stressed the right to liberty, property, security and resistance to oppression. Both declarations had a considerable influence on international human rights law, particularly the UDHR.[8] However, a critical analysis shows that the declarations foreshadowed a number of problems that have continued to haunt international human rights law and are at the heart of many of today's debates. Their shortcomings are readily apparent: the declarations speak of the rights of 'man'; the rights granted are predominantly civil and political, reflecting and privileging certain class interests; and the documents failed to address a number of practices that violate fundamental rights. It is indeed a (telling) paradox that it was not seen as contradictory that these rights were declared while the American settlers were invading indigenous peoples' land, destroying their cultures and practising slavery. At the same time, the French (and others) pursued a policy of imperialism and colonialism and large groups of individuals in their own societies, such as women, were effectively excluded and barred from the enjoyment of rights.[9]

From their inception, the language of rights found in the declarations faced a virulent backlash and attacks from various schools of thought. Those opposed to the liberal bourgeois ideas reflected in the French Declaration, such as Edmund Burke (1729–1797), criticised the abstract and individualistic nature of rights.[10] Burke defended traditional rights, claiming that these reflected long-standing developments and inhered organically in the community.

[6] As evident in the UN Educational, Scientific and Cultural Organization (UNESCO) inquiry informing the UDHR. See below at 1.2.6.

[7] See in particular the works of Thomas Hobbes, John Locke, Thomas Paine, Jean-Jacques Rousseau and Montesquieu. On the historical context and particularly the French Declaration, see J. Waldron (ed.), *Nonsense upon Stilts: Bentham, Burke and Marx on the Rights of Man* (Methuen, 1987), 7–28.

[8] See in this context also S. Moyn, *The Last Utopia: Human Rights in History* (The Belknap Press of Harvard University Press, 2010) who argues that the declarations recognised citizens' rights and that today's human rights are radically different, and essentially a recent development, which he locates in the 1970s.

[9] See in this context U. Baxi, *The Future of Human Rights*, 3rd edn (Oxford University Press, 2008), 59–95.

[10] See account in Waldron, above note 7, 77–95.

Rights were complemented by duties and did not allow the overthrow of government. This 'conservative' perspective has proved highly influential in informing communitarian critiques of the concept of human rights[11] and finds its echoes in contemporary debates on a British Bill of Rights.[12]

The French Declaration was derided as 'nonsense upon stilts' by writers such as Jeremy Bentham (1748–1832), who launched a scathing attack on the notion of natural rights.[13] Bentham argued that rights were only rights if they had been recognised by law, i.e. they must be posited and do not have an independent existence. As the foremost utilitarian thinker, Bentham viewed the primary purpose of rights as maximising aggregate happiness (based on security, subsistence, abundance and equality). The utilitarian attack was characterised by a strong adherence to positivism as a means to escape the metaphysical uncertainty, if not fiction, of natural law. However, legal positivism's faith in a formal law-making process as self-validating bears the inherent risk that the very existence of a law is seen as sufficient justification for its commands irrespective of its substance. The risk posed by extreme positivism was cruelly exposed in the twentieth century after the Nazi period and the fall of communist states, such as the German Democratic Republic (GDR), when officials justified violations by referring to existing national laws. Germany's judiciary responded to this challenge by invoking the Radbruch formula. Gustav Radbruch (1878–1949) argued that statutory law should be set aside if it is entirely incompatible with the idea of justice, in particular where the law deliberately denies equality and does not seek to advance the ultimate goal of any law, i.e. to serve justice.[14] Radbruch's formula marked a partial return to natural law which was also propagated by other legal philosophers such as Ernst Bloch (1885–1977), who had become disenchanted with the decoupling of law and justice inherent in positive law.[15]

[11] See on communitarianism, W. Kymlicka, *Contemporary Political Philosophy*, 2nd edn (Oxford University Press, 2002), 212–21.

[12] L. Maer and A. Horne, 'Background to proposals for a British Bill of Rights and Duties', SN/PC/04559 (3 February 2009), online at http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN04559#fullreport. See also www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/165/165i.pdf.

[13] Reproduced, with commentary, in Waldron, above note 7, 34–45.

[14] See on the practice of German courts in respect of crimes committed by officials of the GDR, *Streletz, Kessler and Krenz* v. *Germany*, (ECtHR) (2001), para. 22, at (cc), and the findings of the ECtHR, ibid., para. 87: 'that a State practice such as the GDR's border policing policy, which flagrantly infringes human rights and above all the right to life, the supreme value in the international hierarchy of human rights, cannot be covered by the protection of Article 7 § 1 of the Convention [prohibition of retroactive application of criminal law]'.

[15] See for a discussion of Bloch's ideas, C. Douzinas and A. Greary, *Critical Jurisprudence: The Political Philosophy of Justice* (Hart, 2005), 99–103.

The industrial revolution in Europe was characterised by stark inequalities and the inhuman conditions in which a large number of children and adults had to work and live.[16] Unsurprisingly, the nineteenth-century working class and labour movements had mixed views of the conceptions of rights embodied in the American and French declarations. Karl Marx (1818–1883) argued in his work 'On the Jewish Question' that human rights as defined in the declarations, in particular the right to property, were used to secure the interests of the capitalist class.[17] He saw human rights as antithetical to a communist society that would overcome the antagonism between the individual and the state by providing for everyone according to his or her needs. Workers, trade unions, socialist movements and leftist political parties have against this background often been critical of the notion of human rights and the very apparatus of the state and the law meant to protect these rights. Nevertheless, it is clear that these actors have made important contributions to the development of human rights law, particularly in respect of the right to non-discrimination, political rights, economic, social and cultural rights, as well as collective rights.[18]

Notwithstanding these criticisms, the American and French declarations exerted symbolic significance and became important reference points as the language of rights and liberties was increasingly invoked to buttress demands for equality, freedom and self-determination.

1.2.3 The struggle for rights in the nineteenth century

The nineteenth century witnessed a growing struggle for rights which was often inspired by the language of the declarations. Feminists, for example, advocated a Declaration of the Rights of Women (Olympe de Gouges (1748–1793) in 1790) and non-discrimination (Mary Wollstonecraft, 1759–1797).[19] Although these endeavours were unsuccessful at the time, they laid the foundation for later women's rights movements.[20] Another major movement evolved to call for the abolition of slavery, an ancient practice that had been transformed into a globalised commercial enterprise negating liberty and dignity and inflicting extreme suffering. The abolitionist movement had been active since the late eighteenth century[21] but the practice of slavery only ended after a series of struggles, such as those by François-Dominique Toussaint-L'Ouverture

[16] See e.g., F. Engels, *The Condition of the Working Class in England* (Penguin Classics, 2006 (first published in 1844)).
[17] See discussion in Waldron, above note 7, 122–4.
[18] Ishay, above note 3, 118–72.
[19] M. Wollstonecraft, *A Vindication of the Rights of Women* (Penguin Classics, 2004 (first published 1792)). Olympe de Gouges' Declaration of the Rights of Women can be found in M. R. Ishay, *The Human Rights Reader*, 2nd edn (Routledge, 2007), 175–80.
[20] See Chapter 11.
[21] J. R. Oldfield, *Popular Politics and British Anti-slavery: The Mobilisation of Public Opinion against the Slave Trade, 1787–1807* (Frank Cass, 1998).

(1743–1803), who led a successful anti-colonial uprising in Haiti,[22] and the American civil war.[23] The transnational movement advocating the abolition of the slave trade played a pivotal role in universally outlawing slavery, as reflected in a series of international treaties.[24] These developments set important international precedents for the recognition of dignity, equality and freedom as fundamental principles applying to the whole of humanity. Equally, nationalist movements throughout the nineteenth and the twentieth centuries invoked the principles of the declarations to demand self-determination and independence for colonised countries.[25] However, power relations and international law edifices developed in the nineteenth and early twentieth centuries combined to delay the end of colonialism,[26] a practice that was marked by large-scale rights violations. The legacy of colonialism continues to exert a profound and largely adverse influence on the protection of human rights, particularly in the way power is exercised at the national and international level.

In the realm of international law the American and French declarations, for all their influence on national constitutions, did not translate into a state practice that recognised human rights or which pierced the veil of sovereignty. The nineteenth century witnessed nascent developments in the field of international humanitarian law, which grew out of a desire to limit excesses on the battlefields.[27] However, international humanitarian law was primarily conceived as a system that imposed an obligation of restraint on the warring parties rather than one that conferred any subjecthood on individuals. One seeming exception to the lack of protection of individuals under international law at the time was the diplomatic protection relating to the minimum standard of treatment of 'aliens'.[28] According to this rule, injury to an alien,

[22] J. D. Popkin, *You are All Free: The Haitian Revolution and the Abolition of Slavery* (Cambridge University Press, 2010). See for a brief overview, N. Stammers, *Human Rights and Social Movements* (Pluto Press, 2009), 63–7.

[23] D. Waldstreicher, *The Struggle against Slavery: A History in Documents* (Oxford University Press, 2002).

[24] J. S. Martinez, *The Slave Trade and the Origins of International Human Rights Law* (Oxford University Press, 2012), highlights in particular the innovative use of anti-slavery courts to combat the slave trade.

[25] F. Cooper, *Africa since 1940: The Past of the Present* (Cambridge University Press, 2002), 66–84. See also B. Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism*, rev. edn (Verso, 2006), and for radical forms of the anti-colonial struggle, F. Fanon, *The Wretched of the Earth* (Penguin Classics, 2001 (first published in 1961)).

[26] See in particular A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2004).

[27] See Chapter 15.

[28] See on diplomatic protection, in particular the work of the International Law Commission (ILC), including the 2006 Draft Articles on Diplomatic Protection, online at http://legal.un.org/ilc/.

including what would be considered human rights violations by today's standards, constituted an injury to the state of which the alien was a national. The state could in turn exercise its right to diplomatic protection on behalf of the individual (as a right of the state, not the individual) and demand appropriate forms of reparation under the rules of state responsibility. This rule became prominent in the nineteenth century when it was often used as a device of imperial powers to protect the economic interests of their nationals, in particular against expropriation. This reflected the inequalities between states and generated considerable opposition.[29] Diverging standpoints came to the fore over the applicable standard of treatment, particularly in the Americas. Some states insisted that it be equality of treatment with nationals, which could result in the lowest common denominator, while others stressed the need for an independent minimum standard of treatment irrespective of national law and practice.[30] The use of diplomatic protection at the time was not based on the recognition of individual rights, but the notion has since undergone considerable changes, assuming a potentially stronger role in the field of international human rights law.[31]

1.2.4 World War I, the League of Nations and human rights

World War I marked the culmination of a prolonged power struggle between European states and came at a time of growing calls for independence and the overthrow of old orders such as that of tsarist Russia. Nationalism, imperialism and the availability of industrially produced weapons in combination with a wanton disregard for human life resulted in a disastrous war that shattered the existing order. This was to have a profound influence on the development of international human rights, which was, however, initially not reflected in the international legal order. It strengthened the position of women, who had become more publicly engaged as a result of the war and now demanded equal rights, with the suffragettes in the United Kingdom (UK) calling for women's right to vote;[32] it buttressed calls by socialist movements for the realisation of social and economic rights;[33] and it laid the foundation for the recognition of the right to self-determination and minority rights.

[29] Anghie, above note 26, 209.
[30] See e.g., *Harry Roberts (U.S.A.)* v. *United Mexican States* (General Claims Commission) (Mexico and United States) (1926), and further E. Borchard, 'The "Minimum Standard" of Treatment of Aliens', (1940) 38 *Michigan Law Review* 445.
[31] See *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo)*, Preliminary objections (ICJ) (2007), 599, para. 39. See also Chapter 2.3.2.
[32] See H. Smith, *The British Women's Suffrage Campaign: 1866–1928,* 2nd edn (Longman, 2009).
[33] Ishay, above note 3, 176–8.

The crisis also gave birth to international institutions, marking a significant shift in the system of international relations and international law. Besides the International Labour Organization (ILO) established in 1919, the most important institution was the League of Nations, set up 'to promote international co-operation and to achieve international peace and security'.[34] It did not have an explicit human rights mandate and the language of its preamble speaks to the traditional sovereignty paradigm of international law: 'maintenance of justice and a scrupulous respect for all treaty obligations in the dealings of organised peoples with one another'. Even so, the League of Nations established a system of minority protection, mainly for Eastern Europe, Turkey and Iraq, which was seen as integral to maintaining peace following the break-up of the Habsburg and Ottoman empires in the region.[35] Treaties under the system, as well as declarations made by states, which were to be supervised by the League Council, provided for the protection of the right to life and liberty, freedom of religion and non-discrimination. They also guaranteed minority rights such as the use of a particular language or education. While the League's minority system was incomplete and inadequately supervised, it established important principles for the protection of members of minorities and provided the basis for the subsequent development of minority rights under international human rights law.

World War I also bolstered demands for self-determination following the rise of nationalist movements and declarations by the then US president, Woodrow Wilson, which resulted in reconfigurations in Eastern Europe.[36] However, in other regions, the colonial powers largely succeeded in containing such demands by delaying transfer of sovereignty through the mandate system established by the League of Nations. Article 22 of the Covenant of the League of Nations set out the general framework of the mandate system and article 23 stipulated minimum standards of treatment of the 'native inhabitants', besides entrusting the League with 'secur[ing] and maintain[ing] fair and humane conditions of labour' and supervising both the implementation of agreements relating to trafficking and drugs, as well as the arms trade. However, instead of paving the way for genuine self-determination and protection of rights, the mandate system introduced the development paradigm into international relations, marking 'the move from exploitative colonialism (imperialism) to cooperative colonialism

[34] See R. Henig and A. Sharp, *Makers of Modern World Subscription: The League of Nations* (Haus Publishing, 2010).

[35] See L. Thio, *Managing Babel: The International Legal Protection of Minorities in the Twentieth Century* (Martinus Nijhoff, 2005), 27–98; P. Thornberry, *International Law and the Rights of Minorities* (Clarendon Press, 1991), 38–52.

[36] See Chapter 10.2.1.